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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Ralph A. Haller
Chief, Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Re: Request for Clarification

Dear Mr. Haller:

This letter is in response to our meeting of March 11, 1994 with Geotek Communications, Inc. ("Geotek"). As you may recall, we agreed that the 900 MHz technical "mask" adopted for 900 MHz equipment in GEN Docket No. 84-1233 had an unintentioned restrictive effect on low power digital equipment. This letter, as you requested, addresses how the Bureau could proceed to cure the unintended restrictive effect.

a. Background

In the Notice of Proposed Rule Making in GEN Docket No. 1233, 50 Fed. Reg. 1582, 1588 (January 11, 1986) ("900 MHz Notice"), the Commission proposed a technical mask for 900 MHz land mobile equipment that essentially mirrored the existing technical mask for 800 MHz land mobile equipment[1] (with slope differences to account for the narrower channel width at 900 MHz[2]). In the technical discussion of the Report and Order in GEN Docket No. 84-1233,[3] the Commission stated that "[w]e desire to allow as much flexibility as possible for end

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[1] 47 C.F.R. § 90.209(g).

[2] The slope difference at 900 MHz, however, is unrelated to the subject problem.

[3] See Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, Report and Order, GEN Docket 84-1233, 2 FCC Rcd 1825, 1834, para. 68 (1986) ("900 MHz Order").

users to choose the equipment that best meets their needs at a cost they can afford." The Commission also explained that "we want the channeling plan for this spectrum to accommodate technologies such as digital that have been developed, but require further advances to make them marketable to private land mobile users." Id. Based on the 900 MHz rule making, it is clear that the Commission intended the 900 MHz technical rules to be flexible and to accommodate new digital technologies not available to the land mobile user in 1986.

The subject problem is as follows: the 900 MHz Order merely failed to reiterate the text of the final sentence that appears in the current Section 90.209(h)(4) in Section 90.209(h)(3) as well.[4] It is clear that this omission was inadvertent by comparison to the parallel rule for 800 MHz equipment, Section 90.209(g), where a technically similar final sentence appears in both Sections 90.209(g)(2) and (3). The effect of this minor omission in Section 90.209(h)(3) is to effectively bar low power mobile and portable units utilizing digital

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[4] As we noted in our letter of December 15, 1993, however, only a strict construction of the subject rule effectively bars low power digital equipment at 900 MHz. If Section 90.209(h)(3) were read to govern the slope of the mask calculated for 900 MHz and the last sentence of Section 90.209(h)(4) were read to govern the lowest required level, then there would be no effective preclusion and the technical rules would be consistent with the policies adopted in GEN Docket No. 84-1233. See Letter to the Chief, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission from Thomas J. Casey and Rick A. Hindman (December 15, 1993).

technology from meeting the 900 MHz mask.[5] Because Geotek is making the first attempt to introduce low power digital mobile and portable units into the marketplace, this matter has not been brought to the Bureau's attention until now.[6]

b. Options

The Bureau has three strong options to cure the unintended result in GEN Docket No. 84-1233. The Bureau could 1) issue a clarification Order, 2) recommend issuance of an erratum, or 3) recommend adoption of a Commission Order pursuant to a good cause finding.[7]

First, a clarification by the Bureau to, for example, cure the minor inadvertent omission in Section

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[5] See Test Lab Report, Inchape Testing Services, Dash, Straus & Goodhue (April 19, 1994) ("Inchape Report") (attached). The Inchape Report sought to determine whether low power digital mobile units that met a 900 MHz mask without the unintentionally restrictive "tooth" would cause interference to adjacent channel receivers. The test involved three reputable and commercially available receivers. It found that low power digital equipment would cause no demonstrable negative effect on an adjacent channel receivers.

[6] The unintended result affects any manufacturer of low power digital mobile and portable (and even analog portable equipment) due to the modulation characteristics involved. See Inchape Report.

[7] As we discussed in our last meeting, the evidence demonstrates that the restrictive effect of the 900 MHz mask was not intended. In addition, this matter concerns the 900 MHz mask's restrictive effect on the modulation characteristics of low power digital equipment generally, and does not concern any specific technology. See Inchape Report. Thus, a waiver would not be an appropriate option under these circumstances. Therefore, we recommend options that would cure the unintended result so that the 900 MHz mask conforms with the Commission's intent expressed in GEN Docket No. 84-1233.

90.209(h)(4), would be a permissible interpretive action. 5 U.S.C. § 553(b)(A).[8] Under almost identical facts, the Bureau recently recommended adoption of a Commission Order that clarified rules in Part 95.[9] In the IVDS MO&O, a party argued that because trusts are typically eligible for private radio licenses, it appeared that their omission from the list in Part 95 of entities eligible for IVDS licenses was inadvertent. IVDS MO&O, 8 FCC Rcd at 2788- 2789. Therefore, the Commission adopted a minor editorial revision to Part 95 to clarify that trusts are eligible for station licenses.[10] In the instant case, there is agreement that the parallel technical rule for the 800 MHz mask, the 900 MHz Notice and the 900 MHz Order are evidence that the Commission intended to accommodate low power digital mobile and portable units at 900 MHz, and therefore, the omission of certain technical language from the rule for the 900 MHz mask was inadvertent.[11] Therefore, it is clear that there is

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[8] See Sentara-Hampton General Hospital v. Sullivan, 980 F.2d 749 (D.C.Cir. 1992), Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980) ("an interpretative rule ... is one that merely clarifies or explains an existing rule."), Garelick Mfg. Co. v. Dillon, 313 F.2d 899 (D.C. Cir. 1963) (upholding Treasury rules as exempt from notice and comment procedures because they clarified a proceeding's final rules issued two years earlier).

[9] See Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video and Data Services and Reinstatement of Dismissed Interactive Data Services License Applications, Second Memorandum Opinion and Order, GEN Docket 91-2, 8 FCC Rcd 2787 (1993) ("IVDS MO&O").

[10] Id (also clarifying that governmental and educational are eligible for IVDS because it agreed with a party's "interpretation of [the Commission's] decisions in the [IVDS] Report [and Order, 7 FCC Rcd 1630 (1992)].").

[11] As the IVDS MO&O suggests, a clarification may have a "substantial impact on the rights of individuals." American Postal Workers Union v. U.S. Postal Service, 707

(continued...)

established Commission precedent for a Bureau Chief Order "involving changes clarifying a rule," 47 C.F.R. § 0.332(a)(1), or alternatively, a Commission Order.[12]

Second, because the restrictive effective was not intended, an erratum is also an option. Although several years have passed since the adoption of the subject rule, the Bureau could only learn of the unintended result after an equipment manufacturer commenced testing of low power digital equipment, which, as it happens, did not take place till now. Precedent dictates that an agency may issue a correction that "is consistent with record evidence and would have constituted a logical outgrowth of the proposed rules if originally promulgated as corrected." International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) (upholding OSHA rule modifications made by a "technical corrections notice" 13 months after issuance of the final rules); see also Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, Memorandum Opinion and Order, BC Docket No. 81-741, 101 F.C.C.2d 827, 840-841 (1985) (upholding an erratum in the absence of any evidence of "serious or significant harm

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[11](...continued)
F.2d 548, 560 (D.C. Cir. 1982) (interpreting 5 U.S.C. § 553(b)(A)).

[12] The IVDS MO&O amended the rules to clarify the trust issue apparently because it was not discussed in the IVDS Report, but did not also amend the rules to clarify the governmental and educational entities issue apparently because it was discussed in the IVDS Report. Because, as in the IVDS MO&O, there is agreement that there was an unintended result in the 900 MHz Order, and new digital technologies were discussed therein, the Bureau has the flexibility to clarify this matter by a Bureau Chief Order without amending the rules. A Bureau Chief Order could also clarify this matter without amendments under the interpretation discussed in note 3, supra.

to any party").[13] In light of the record evidence in this case, an erratum would be an appropriate option.

Third, the Bureau could recommend adoption of a Commission Order that relies upon the "good cause" exception to the notice and comment provisions of the APA. 5 U.S.C. § 553(b)(B). Under this exception, the Commission may for good cause find that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." Id. Under the legislative history of this provision, Congress defined "unnecessary" as where "a minor or merely technical amendment in which the public is not particularly interested [is] involved." H.R. Rep. No. 79-1980, 79th Cong., 2d Sess. (1946).

Recently, the Bureau recommended adoption of a Commission Order that relied on the APA's good cause - unnecessary exception when it adopted changes to Part 80.[14] In the instant case, the action requested would involve a minor and merely technical amendment concerning an issue on which no parties commented in the record. Therefore, the Commission could find that additional notice and comment would be unnecessary as the basis for a good cause finding.[15]

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[13] Because it is difficult to imagine a bona fide and significant harm arising from the correction contemplated here, an erratum should not be vulnerable under reconsideration. The correction would not require any modifications to existing 900 MHz analog equipment.

[14] See Amendment of the Maritime Services Rules to Implement Changes in the Coast Guard's Rules Pertaining to the Vessel Bridge-to-Bridge Radiotelephone Act, Order, 7 FCC Rcd 8552 (1992) (Citing U.S. v. United States Trucking Corporation, 317 F.Supp 69 (S.D.N.Y. 1970).

[15] The D.C. Circuit appears to "reluctantly countenance" use of the good cause exception where an agency argues that notice and comment was "impracticable", which would not be the applicable argument here. See, e.g., Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

c. Recommendation

Because Geotek believes that any of the three options discussed above would successfully cure the subject rule, Geotek respectfully requests that the Bureau initiate the course of action it deems appropriate and thereby provide for the introduction of low power digital mobile and portable equipment at 900 MHz.

Sincerely,

Richard A. Hindman
Marc S. Martin

cc: Beverly G. Baker
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